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No. 79-1344

IN THE

Supreme Court of the United States

1980 TERM

MICHAEL M.,

Petitioner,

—v.—

SUPERIOR COURT OF SONOMA COUNTY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CALIFORNIA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, IN SUPPORT OF PETITIONER, *AMICI CURIAE*

CHARLES S. SIMS
BRUCE J. ENNIS, JR.
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, N.Y. 10036
(212) 944-9800

Attorneys for *Amici Curiae*

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Interest of Amici Curiae

The American Civil Liberties Union is a nationwide, nonprofit organization of over 200,000 persons, dedicated to defending and protecting the rights enumerated in the

Constitution. Together with its affiliates, including amicus American Civil Liberties Union of Northern California, the ACLU has had a special interest in challenging gender-based discriminations as violative of the constitutional equal protection guarantee. ACLU attorneys have appeared in this Court, either directly or for amici, in most of this Court's gender discrimination cases.

The decision below rests on an archaic, overbroad generalization under which California penalizes sexual intercourse with minor women, but not with minor men, and prosecutes only males for such intercourse even where both parties are minors. We believe the ACLU's experience in gender-discrimination cases can be of substantial assistance to the

Court as it decides whether the conviction of Michael M. under these circumstances would deny him the equal protection of the laws guaranteed by the Constitution.

SUMMARY OF ARGUMENT

Michael M.'s conviction under §261.5 of the California Penal Code is invalid under the equal protection clause for two independent reasons.

First, §261.5 is itself facially violative of the equal protection guarantee. Because it discriminates on the basis of gender, authorizing punishment of men who have sexual intercourse with women under 18 years of age, but not punishment of women who have intercourse with men under 18, §261.5 must satisfy at least

the test articulated in Craig v. Boren, 429 U.S. 190 (1976). Point 1A. Section 261.5 fails to meet that test. The purpose asserted, prevention of pregnancy, is only a hindsight rationalization. The statute's actual purpose, the protection of female virtue, is constitutionally impermissible. Point 1B. Even if pregnancy prevention were its real purpose, Section 261.5 would be invalid because premised on archaic and overbroad stereotypes. Point 1C.

In any event, even were the Court to uphold §261.5 against a facial attack, the equal protection guarantee forbids its application here. Not only the so-called "victim" here, but also petitioner, was under the California age of consent. California has advanced no reason justify-

ing holding only under-age males, and not under-age females, culpable for consensual sexual intercourse with an under-age partner. It is irrational to hold only the minor male criminally responsible for such joint conduct, where he is roughly the same age as his female sexual partner. Point II.

ARGUMENT

I. CALIFORNIA PENAL CODE SECTION 261.5 CREATES A GENDER-BASED CLASSIFICATION VIOLATIVE OF THE EQUAL PROTECTION CLAUSE.

A. Section 261.5 Discriminates On The Basis Of Sex And Must Therefore Be Subject To Heightened Scrutiny Under The Equal Protection Clause.

As the majority below expressly conceded, Michael M. v. Superior Court, 25 Cal. 3d 608, 611 (1979), Section 261.5 discriminates on the basis of gender. It punishes males who engage in consensual sexual intercourse with females under eighteen but not females who engage in the same conduct with males under eighteen. It is well settled that statutory gender classifications are subject to heightened scrutiny under the equal protection clause. Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973); Craig

v. Boren, 429 U.S. 190 (1976). The fact that a classification arguably discriminates against men rather than women does not shield it from such scrutiny. Orr v. Orr, 440 U.S. 268, 278 (1979).

The standard of review for gender classifications is at least the so-called "intermediate" or "middle tier" standard first articulated in Craig v. Boren, 429 U.S. at 197: "To withstand constitutional challenge...classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." Wengler v. Druggists Mutual Insurance, 48 U.S.L.W. 4459, 4461 (1980); Orr v. Orr, supra; Califano v. Webster, 430 U.S. 313 (1977). Since Section 261.5 is a criminal statute, the Craig standard must be applied with added bite and "special sensitivity".

Meloon v. Helgemoe, 564 F.2d, 602, 604 (1st Cir. 1977), cert. den. 436 U.S. 950 (1978). In the criminal justice context, where the coercive power of the state "weighs most heavily upon the individual or the group" and where deprivation of basic liberty is at stake, the normative demands of the equal protection clause must be rigorously and scrupulously enforced. McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

As applied by this Court in recent cases, the Craig test is tripartite. First, it demands that the asserted governmental objectives be "important". The promotion of traffic safety, Craig v. Boren, 429 U.S. at 199, the provision of assistance to needy spouses, Orr v. Orr, 440 U.S. at 280, and the reduction of economic disparity between men and women, Califano v. Webster,

430 U.S. at 317, have all been adjudged sufficiently "important" governmental objectives.

Second, the Craig standard requires that the objective of the challenged statute be substantially furthered, both in reason and in fact, by the differential gender treatment. A challenged gender classification may not be premised on traditional but unsubstantiated assumptions or manifestly overbroad generalizations about the "proper" roles or "usual" characteristics of the two sexes. Under the Craig standard, differential gender treatment may not be premised on such "archaic and overbroad generalizations", Schlesinger v. Ballard, 419 U.S. 498, 508, (1975), as the following: that men make better estate administrators then women, Reed v. Reed, 404 U.S. 71 (1971); that

women are dependent on their husbands for financial support while men are not dependent on their wives, Califano v. Goldfarb, 430 U.S. 199 (1977); that women are destined for home-making rather than for the marketplace or world of ideas, Stanton v. Stanton, 421 U.S. 7 (1975).

Third, the purpose asserted in defense of the challenged gender classification must have been among the actual purposes of the enacting legislature. Where a gender classification is at issue the mere incantation of an important governmental purpose is "not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme". Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975). Rather, the Craig standard requires an independent examination of the language, structure, and history

of the challenged statute in order to determine whether the asserted purpose is simply "a convenient, but false, post hoc rationalization", Craig v. Boren, 429 U.S. at 199 n.7, for a statute promulgated with other purposes in mind. Califano v. Webster, 430 U.S. at 317; Weinberger v. Wiesenfeld, 420 U.S. at 648; Meloon v. Helgemoe, 564 F.2d at 607. Under "intermediate" level scrutiny, post hoc rationalization - justification by reference to objectives other than those which the enacting legislature in fact had in mind - is impermissible. See L. Tribe, American Constitutional Law 1085 (1979).

B. The Language, Structure, And History Of Section 261.5 Show That The Prevention Of Teen-Age Pregnancies Is A Convenient Hindsight Rationalization For A Statute Enacted With Different Purposes In Mind.

Respondent below makes an impressive showing that illegitimate teenage pregnancy is a major medical and social problem in California. Amici do not dispute the reality or the gravity of that problem, or deny that reducing the incidence of such pregnancies is an "important" governmental objective. What amici do dispute is respondents' assertion, embraced by the majority below without due skepticism, that section 261.5 was actually enacted for that purpose.[1/] Respondent has not

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1/A state's highest court is the ultimate expositor of the meaning of its state's laws. Brown v. Ohio, 432 U.S. 161, 167 (footnote continued on next page)

(footnote continued from previous page)

(1977); Gurley v. Rhoden, 421 U.S. 200, 208 (1975); Mullaney v. Wilbur, 421 U.S. 684, 691 (1975). But this Court is not similarly bound by state court pronouncements on the purposes of state laws. It "need not in equal protection cases accept at face value assertions of legislative purposes", Weinberger, 420 U.S. at 648 n.16, even by a state's highest court, but may instead undertake an independent examination of the legislative scheme and history. See, e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972) (statement by Massachusetts Supreme Judicial Court as to challenged statute's purpose examined and rejected).

As a general matter this Court must remain the final arbiter of a state law's purposes whenever the applicable constitutional test turns on a determination of "true" or "actual" purpose. Otherwise, state courts, by "finding" valid purposes, could effectively shield discriminatory laws from the scrutiny of this Court. The need for this Court to undertake an independent examination is especially urgent in the present case where the state court majority below simply disregarded its own long-standing construction of statutory purpose. When this Court undertakes its own independent inquiry into a challenged statute's actual purposes, the views of the state court below deserve careful consideration. But these views cannot be controlling. See, e.g., Rundlett v. Oliver, 607 F.2d 495, 500-1 (1st Cir. 1979).

offered an iota of evidence, intrinsic or extrinsic, that the prevention of such pregnancies was among the purposes for which the California statutory rape law was originally enacted or later re-enacted. To the contrary, all the inferences that may be drawn from the statute's history, language, and structure indicate that its purpose was the protection of young female virtue. Under the "actual purposes" rule of Weinberger, pregnancy prevention may not be invoked to save §261.5.

Section 261.5 proscribes the conduct previously denominated "statutory rape". When first enacted in 1850 (Stats. 1850, Ch.99, 847, §234) the statute followed the English statute of 1576 (18 Eliz.I, Ch.7, §4), proscribing sexual intercourse with females under the age of ten. Inasmuch as females did not reach puberty until well after that age, California's

original statutory rape law obviously could not have been enacted for the purpose of preventing pregnancies.

Between 1889 and 1913 the age of consent was raised incrementally from ten to eighteen. The age of eighteen was retained when the statute was recodified and the offense re-named in 1970. See Note on Legislative History following California Penal Code Sections 261 (West 1970) and 261.5 (West Supp. 1977). But there is no reason to believe that the legislature raised the age of consent in order to prevent teenage pregnancies. The age of consent was raised to eighteen in 1913, before the radical change in teenage sexual mores which has created the present teenage pregnancy problem. Moreover, as the dissent persuasively argued, "a far more

plausible explanation" for the gradual increase in age of consent is the parallel change in popular views "both with regard to the suitable age of women for marriage and the age until which they were deemed appropriately subject to protective legislation." Michael M. v. Superior Court, 25 Cal. 3d 608, 619 (Mosk, J., dissenting). Thus whereas the 1872 California Civil Code fixed 15 as the age at which a female could marry without parental consent, the 1921 Civil Code raised that age requirement to 18. Id. Furthermore, even after the legislature had raised the age of consent to a point at which conception was biologically possible, the courts of California uniformly identified the statute's purpose as the protection of the virtue of California's girlhood. See, e.g., People v. Verdegreen, 106 Cal. 211, 214, 39 P.607 (1895)("The

obvious purpose of [the statute] is the protection of society by protecting from violation the virtue of young and unsophisticated girls"); People v. Edwards, 163 Cal. 752, 757, 127 P.58 (1912). Indeed, the Verdegreen court went so far as to hold that mere "advances" made with an intent to commit statutory rape could constitute an assault to commit that offense, reasoning as follows: "It is the insidious approach and vile tampering with their persons that primarily undermines the virtue of young girls, and eventually destroys it; and the prevention of this, as much as the principal act, must undoubtedly have been the intent of the legislature". 106 Cal. at 215.

In more recent decisions, prior to Michael M., the California Supreme Court consistently identified the protection of

female virtue as the statute's purpose. Thus, in People v. Hernandez, 61 Cal. 2d 529, 531, 393 P.2d 673 (1964), a carefully considered leading opinion on the mistake of age defense in the statutory rape context, the California Supreme Court stated that its statutory rape law was designed to prevent a young female, "presumed too innocent and naive to understand the implications and nature" of the sexual act, from making "an unwise disposition of her sexual favor". Such a disposition is deemed, the court explained, to do "harm both to herself and the sexual mores by which the community's conduct patterns are established". The prevention of pregnancy is nowhere mentioned by the Hernandez Court. Rather, it is "abstinence from sexual indulgence" on the part of young women that the statute

is said to promote. Inasmuch as there is no evidence that the California legislature repudiated this reading of the statutory purpose when it re-enacted the provision in 1970, it may properly be deemed to have adopted it. See, e.g., Scripps Memorial Hospital v. California Employment Commission, 24 Cal. 2d 669, 151 P.2d. 109 (1944); South Dakota v. Brown, 20 Cal. 3rd 765, 772-73, 576 P.2d 473, 480-81 (1978); Belridge Farms v. Agricultural Labor Relations Board, 21 Cal. 3rd 551, 557, 580 P.2d 665, 681 (1978).

The language and structure of §261.5 likewise attest to a purpose other than the prevention of illegitimate teenage pregnancy. For the statute "makes no attempt to define culpability in terms of sexual intercourse that creates a risk of pregnancy", 25 Cal. 3d 608, 620 (Mosk, J., dissenting), but rather proscribes numerous classes of acts

which cannot result in pregnancy (or are very unlikely to do so). For example, §261.5 applies whether or not reliable contraceptives are used, whether or not the female is pubescent, whether or not one partner knows himself or herself to be sterile, and so forth. On its face the statute applies to a fourteen year old pre-pubescent male who has made the slight penetration necessary to commit the offense ("Any sexual penetration, however slight, is sufficient to complete the crime", Pen. Code, §263), as well as to an adult male who has had a vasectomy. With regard to pregnancy prevention, then, §261.5 is clearly over-inclusive. This strongly corroborates what the review of the statute's history disclosed - that its purpose is to prevent the act of sexual intercourse itself, not the pregnancy

which may result therefrom. Cf. Orr v. Orr, 440 U.S. at 280 n.10.

California may well have a legitimate interest in protecting and safeguarding the good morals of its youth. But recent decisions of this Court make clear that a state may not constitutionally undertake to promote different moral codes for its male and female youth or to reinforce a traditional and outworn division of socio-sexual roles. See, e.g., Stanton v. Stanton, 421 U.S. 7, 15 (1975) (Utah's differential age-of-majority statute may not be justified by the "old notion" that a woman is "destined solely for the home and the rearing of the family"); Orr v. Orr, 440 U.S. at 279, (Alabama may not constitutionally frame its alimony laws with the objective of reinforcing among its citizens a family model in which the

wife plays a dependent role).

California has undertaken to do in §261.5 precisely what Stanton and Orr forbid. In §261.5 California has unmistakably announced its belief that the virginity of teenage girls is more precious than that of teenage boys. It has "effectively announced", Orr, 440 U.S. at 279, its strong preference for sexual "abstinence", Hernandez, 61 Cal.2d at 531, by its female youth, and its relative indifference to sexual activity by its male youth. It has, in short, put the imprimatur of the state on the "double standard". Section 261.5 is thus an expression of the sort of "romantic paternalism" no longer tolerable under the equal protection clause.

C. The Exclusion Of Young Males From The Protection Afforded By Section 261.5 Impermissibly Reflects And Reinforces Sexual Stereotypes Unfavorable To Both Sexes.

Even assuming arguendo that its purpose is in fact the prevention of teenage pregnancy, §261.5 cannot survive scrutiny under the Craig standard because it is premised on "archaic and overbroad generalizations", Schlesinger v. Ballard, 419 U.S. 498, 508 (1975), about the two sexes. The exclusion of young males from the protection of Section 261.5 is the result not of a careful and considered analysis of their different needs but rather of an unthinking assumption that they cannot be as seriously harmed by sexual intercourse as can young females. This sort of unreflective "traditional way of thinking" about the sexes is constitutionally unacceptable. Califano v.

Goldfarb, 430 U.S. at 223 (1977)(Stevens, J., concurring).

The overall effect of California's statutory scheme can be simply stated. An adult female who engages in sexual intercourse with a minor male might possibly be subject to prosecution for a misdemeanor under Section 272 ("contributing to the delinquency of a minor"). An adult male who engages in the very same conduct with a minor female is subject to prosecution not only for a misdemeanor under Section 272 but also for a felony under Section 261.5 ("unlawful sexual intercourse"). The result, quite clearly, is that minor males are not afforded the same protection from sexually predatory adults as are minor females.

The majority below reasoned that minor

females are afforded more protection simply because they need more. After all, the majority observed, minor females are susceptible to the "demonstrably greater" harm associated with unwanted pregnancy. Michael M. v. Superior Court 25 Cal.3d 608, 613 (1979). The trouble with the majority's justification of the disparate treatment is that it disregards the fact that minor males can and do suffer from sexual intercourse harm as grave as, albeit different from, that suffered by minor females. See, e.g., D. Finkelhor, Sexually Victimized Children (1979). California's decision to give only minor females the additional protection of §261.5 was based, amici submit, not on a careful comparative analysis of the needs of the two classes of minors, but rather on unreflective stereotyped assumptions about the four classes of persons involved.

These underlying stereotypes are not difficult to divine. Adult males are assumed to be aggressive predators whose passions will lead them to exploit young females unless deterred by the threat of heavy criminal penalties. Minor males are assumed to be able to "take care of themselves". For them, early sexual experience is supposed to be a welcome and pleasant initiation creating no appreciable risk of psychological harm. Minor females, in contrast, are assumed to be passive, weak-willed, vulnerable to trickery and intimidation: for them early sexual experience is supposed to be traumatic, painful, and degrading, creating a serious risk of permanent psycho-sexual harm. Finally, adult females are assumed to be uninterested in minor males as sexual partners and unable to trick or pressure them into sexual activity which they do not

really desire or for which they are psychologically unprepared.

Section 261.5, then, is premised on assumptions about the two sexes which are invidious, manifestly overbroad, and demonstrably at odds with recent empirical research. See, e.g., D. Finkelhor, Sexually Victimized Children at 80 (reporting that young males often perceive early sexual experience with adult females "negatively"); Report of the Royal Commission on the Status of Women in Canada Ch.9, par. 42, at 374 (1970)(recommending that the Criminal Code be amended to extend protection from sexual abuse to male juveniles); R. Geiser, Hidden Victims: The Sexual Abuse of Children at 23 (1979) (reporting that sexual assaults on children by women are increasing). A statute so premised cannot withstand constitutional scrutiny under the Craig standard.

II. SECTION 261.5 CANNOT CONSTITUTIONALLY BE APPLIED WHERE THE OFFENDER IS A MINOR, ONLY ONE YEAR OLDER THAN HIS ALLEGED "VICTIM".

Petitioner stands charged by information with a felony violation of §261.5 (unlawful sexual intercourse). At the time of the alleged violation petitioner was 17 years old and his alleged "victim" was scarcely a year younger than himself. Even if §261.5 could be applied constitutionally to protect minor females from older, more sophisticated males, its application here nevertheless clearly violates the equal protection guarantee. Where the male is himself a minor legally presumed to possess less maturity and wisdom than adults, and moreover has not exploited a significant disparity in age to seduce, intimidate, or trick the female minor into sexual intercourse, it is wholly

arbitrary and irrational to single him out for criminal punishment.[2/] The fact that only the minor female is susceptible to pregnancy has no bearing at all on their relative culpability for a joint act of intercourse.

As the Brief for Petitioner amply demonstrates, §261.5 is a decidedly anomalous statute. Only in a mere handful of American jurisdictions would the facts alleged in the information against petitioner constitute a criminal offense. In

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2/The present case does not present, and this Court need not decide, the question whether §261.5 can constitutionally be applied where the male offender is an adult slightly older than his minor "victim" (e.g. 19-year-old male, 17-year-old female) or where the male, though a minor, is significantly older than his female "victim" (e.g. 17-year-old male, 11-year-old female).

fully three-fourths of the states the age of consent is 16 or below. Seven states demand that the offender be at least 18. Six others require that the offender be a specified number of years older (usually two or four) than his "victim". In several others a two or four year age differential aggravates the penalties. In the great majority of states, then, criminal liability is imposed on the male only where, by virtue of his greater age, he can fairly and reasonably be assumed to be primarily responsible for the proscribed sexual activity.[3/] California's

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3/Respondent contends that the "overwhelming weight of authority" supports the constitutional validity of statutory rape laws. Brief of Respondent in Opposition to Certiorari at p.3. But none of the cases cited by respondent addresses the precise issue presented here.

In some of the cited cases the challenged

(footnote continued on next page)

statute stands almost alone in taking no account whatever of the absolute age of the male offender (any male who has reached 14, the age of criminal responsibility, may be prosecuted under §261.5) or the relative ages of the participants. Thus in California a 14-year-old male can be prosecuted under §261.5 for sexual intercourse with a 17-year-old female, even where the female initiated the activity. The female, in these circumstances, cannot be prosecuted at all under §261.5. As applied to a minor male of roughly the same age as his "victim", the California statute's automatic assignment of exclusive culpability to the male is arbitrary and invidious. See e.g., Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972)(Oklahoma statute giving the benefit of juvenile court proceedings to females under 18 and

males under 16 violates the equal protection clause); Commonwealth v. McKenzie, 368 Mass. 613, 334 N.E.2d 613 (1975)(statute making it a misdemeanor for father but not mother to beget a child out of wedlock violates equal protection clause); Commonwealth v. Staub, 337 A.2d 258 (Pa. 1975)(larger fine for man than for woman convicted of fornication violates equal protection clause).

California's asserted interest in the prevention of teenage pregnancy cannot justify such disparate gender treatment, inasmuch as the act which creates the risk of pregnancy is one in which both minors participate and for which both must at least be presumed equally responsible.[4/]

4/This is not to say that each of the two minors must be punished with equal severity in every case. What the equal protection clause requires are determinations of culpability made on an individualized basis rather than on a wholesale gender basis.

To be sure, only the minor female can become pregnant. But this fact does not diminish, and is irrelevant to, her responsibility.[5/] For instance, a 16-year-old female who knowingly misleads her earnest and concerned 16-year-old partner about the risk of pregnancy (e.g., by assuring him that she takes birth control pills) is surely more culpable then he. Should a pregnancy result it is she, if anyone, who ought to be held legally answerable.

Nor can California defend its conclusive presumption of male culpability on the ground that with respect to sexual

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5/ The majority below seems to confuse the issue of responsibility with that of just punishment. A minor female who engages in consensual sexual intercourse with a minor male must be presumed equally responsible for the act which creates the risk of pregnancy. That she may suffer, or has already suffered, the unhappy consequences of an unwanted pregnancy may perhaps argue for leniency at the sentencing stage. But it is not morally exculpatory.

activity minor females are "in general" less knowledgeable and sophisticated, less capable of making informed and reasoned decisions, or less resistant to subtle psychological coercion and deception than are their minor male counterparts. Such a defense is constitutionally unacceptable in several respects. First, the notion that young males develop mental and emotional capacities at an earlier age than young females is nothing but an "old notion", Stanton v. Stanton, supra, wholly lacking in empirical support. In a society where female children were carefully sheltered from knowledge of "the facts of life" that notion might have had some basis. In contemporary California it clearly has none at all. Second, California law contemplates many situations in a young person's life, arguably of equal or greater importance than

the decision to engage in sexual intercourse, in which the two sexes are clearly presumed to possess equal capacity to make the necessary decisions and give prudent and informed consent. For example, all minors over age 14 are responsible for their criminal conduct (Penal Code Section 26); all minors over 14 may appoint guardians ad litem (Civil Code Section 373); all minors living apart from parents or guardians may consent to medical treatment (Civil Code Section 34.6). California does not (and doubtless cannot) convincingly explain why minors of both genders are presumed to be equally capable in such matters, while only female minors are presumed unable to appreciate the significance of sexual intercourse.

If California genuinely believes that a female under 18 cannot comprehend the

full significance of sexual intercourse and protects her from being held responsible for the consequences thereof, then it is irrational and inconsistent to hold males of the same or lesser age criminally responsible for the same conduct. See Rundlett v. Oliver, 607 F.2d 495, 502 n.15 (1st Cir. 1979)("...we note...that we remain in doubt as to the acceptability of justifying a gender based classification on the basis of a pregnancy prevention rationale...[w]e doubt that the Maine legislature, having adjudged that persons under a certain age are incapable of giving informed consent to the act of sexual intercourse, would choose to penalize only a male under-aged partner for taking the... risk of conceiving a child".) Application of Section 261.5 to petitioner, but not to his female "victim", constitutes a denial of equal protection.

CONCLUSION

For the foregoing reasons the judgment below should be reversed.

Respectfully submitted,

CHARLES S. SIMS
BRUCE J. ENNIS, JR.
c/o American Civil
Liberties Union
Foundation
132 West 43rd Street
New York, N. Y. 10036
(212) 944-9800

Attorneys for *Amici Curiae**

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